

BRB Nos. 89-1226 BLA  
and 89-1226 BLA-A

VIRGINIA TERRY )  
(Widow of ARTHUR TERRY) )  
 )  
Claimant-Petitioner )  
Cross-Respondent )

v. )

HOBET MINING COMPANY )  
 )  
Employer-Respondent )  
Cross-Petitioner )

DATE ISSUED:

)  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest )

DECISION and ORDER

Appeal of the Decision and Order of Ben L. O'Brien, Administrative Law Judge, United States Department of Labor.

Belinda S. Morton, Fayetteville, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.\*

PER CURIAM:

Claimant, the surviving spouse, appeals, and employer cross-appeals, the Decision and Order (87-BLA-01483) of Administrative Law Judge Ben L. O'Brien denying benefits on a survivor's claim and awarding benefits on a miner's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). The

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

administrative law judge reviewed both the miner's and survivor's claims pursuant to the provisions of 20 C.F.R. Part 718, and credited the miner with at least twenty-three and one-half years of qualifying coal mine employment. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded on the miner's claim. The administrative law judge additionally found, however, that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and consequently denied benefits on the survivor's claim. Claimant appeals the denial of benefits on the survivor's claim, and argues that she was entitled to invocation of the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. Employer responds, urging affirmance of the denial of benefits on the survivor's claim. In a cross-appeal, employer challenges the administrative law judge's findings pursuant to Section 718.204 on the miner's claim, and contends that the administrative law judge erred in awarding benefits through the month of the miner's death. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.<sup>1</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Turning first to the survivor's claim, claimant asserts that she was entitled to invocation of the rebuttable presumption of death due to pneumoconiosis pursuant to Section 718.305. We disagree. The presumption at Section 718.305 is not available to claimant, inasmuch as her claim was filed after January 1, 1982. Director's Exhibit 2; see Kubachka v. Windsor Power House Coal Co., 11 BLR 1-171 (1988). As claimant has raised no other allegations of error, we hereby affirm the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c), see Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983), and thus we affirm his denial of benefits on the survivor's

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<sup>1</sup> The administrative law judge's findings pursuant to Sections 718.202(a)(2) and 718.203, and with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

claim.

Turning to the merits of the miner's claim, employer contends that, in finding total disability established pursuant to Section 718.204(c)(4), the administrative law judge failed to provide an adequate rationale for relying on the consultative opinion of Dr. Gaziano, who found that the miner was totally disabled by pneumoconiosis prior to his death, and for rejecting the consultative opinions of Drs. O'Connor and Fino, who found that the miner had no respiratory impairment due to pneumoconiosis. Decision and Order at 7, 8; see Director's Exhibits 14, 18, 31, Employer's Exhibit 3. We agree. The administrative law judge, without any specific finding of bias, gave greater weight to the "independent" opinion of Dr. Gaziano, whose review was performed on behalf of the Department of Labor, over the opinions of the physicians whose services were solicited by employer. Absent a foundation in the record for a finding that the Department of Labor's expert is independent, however, the administrative law judge may not accord his opinion greater weight on that basis alone. See Stanford v. Valley Camp Coal Co., 7 BLR 1-906 (1985); Brown v. Director, OWCP, 7 BLR 1-730 (1985); Chancey v. Consolidation Coal Co., 7 BLR 1-240 (1984). The administrative law judge additionally found that the opinion of Dr. Gaziano was more persuasive inasmuch as it was consistent with the medical evidence of record. Although we agree that an administrative law judge may properly accord greater weight to those opinions which are better supported by the objective evidence of record, see Wetzel v. Director, OWCP, 8 BLR 1-139 (1985), Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985), we cannot affirm the administrative law judge's reliance on Dr. Gaziano's opinion in the case at bar, as the administrative law judge did not address all of the objective studies of record and resolve the conflicts therein prior to analyzing the medical opinions, which were based in part on those studies. Specifically, in evaluating the pulmonary function study evidence of record pursuant to Section 718.204(c)(1), the administrative law judge noted that the study obtained by Dr. Herr produced qualifying<sup>2</sup> values, but that Dr. Vest determined that the study was invalid. See Director's Exhibits 13, 16; Employer's Exhibit 2. The administrative law judge then found that claimant failed to establish total disability pursuant to Section 718.204(c)(1), without providing a reason for crediting the opinion of Dr. Vest over

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<sup>2</sup> A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

that of Dr. Herr.<sup>3</sup> See Decision and Order at 6, 7. Similarly, in evaluating the blood gas study evidence of record, the administrative law judge noted that the most recent study of October 27, 1984, produced qualifying values and that a study obtained on October 2, 1984, was non-qualifying, but the administrative law judge did not weigh this conflicting evidence or provide a rationale for his conclusion that claimant failed to establish total disability pursuant to Section 718.204(c)(2). The record also contains blood gas studies obtained on February 19, 1982, and June 27, 1984, which the administrative law judge did not address. See Director's Exhibit 13. Consequently, we must vacate the administrative law judge's findings pursuant to Section 718.204(c), and remand this case for the administrative law judge to reconsider the objective evidence of record and resolve the conflicts therein pursuant to Section 718.204(c)(1) and (c)(2), and to re-assess the medical opinions of record pursuant to Section 718.204(c)(4) in light of the record considered as a whole. See Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986). If, on remand, the administrative law judge finds that claimant has established a totally disabling respiratory impairment pursuant to Section 718.204(c), he must then determine whether this impairment is due to pneumoconiosis pursuant to Section 718.204(b).<sup>4</sup> See Robinson v. Pickands Mather & Co., 914 F.2d 1144, 14 BLR 2-68 (4th Cir. 1990).

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<sup>3</sup> The record also reflects that Dr. Gaziano reviewed these pulmonary function study tracings and based his finding of total disability in part thereon. See Director's Exhibit 18.

<sup>4</sup> Employer correctly maintains that if, on remand, the administrative law judge finds entitlement established on the miner's claim, benefits would only be awardable through September 1984, the month preceding the miner's death. See 20 C.F.R. 725.203(b)(1); Decision and Order at 9.

Accordingly, the administrative law judge's Decision and Order awarding benefits on the miner's claim is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion. The administrative law judge's Decision and Order denying benefits on the survivor's claim is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

LEONARD N. LAWRENCE  
Administrative Law Judge